



Judicial Equities Override Filtration Requirement



Over time, many water and wastewater utility systems have been concerned about rigid imposition of costly treatment plant upgrades without comparable, discernable benefits.

Typically, the potential for successful requests for variances or exemptions from such upgrades is very limited or even nonexistent.

However, a recent federal court decision may have created an opportunity for relief from United States Environmental Protection Agency (EPA) rules that impose costs that substantially exceed benefits. The court affirmed denial of an injunction sought by EPA to force a regional water supply agency to construct water filtration facilities after the water agency allegedly violated EPA's avoidance criteria under its Surface Water Treatment Rule (SWTR). The court found that the balance of "equities" justified denial of the injunction to compel filtration. In reality, the court held that the cost of filtration exceeded benefits, given that less costly alternatives to provide safe water were available. *U.S. v. Massachusetts Water Resources Authority*, 256 F. 3d 36 (1st Cir. 2001).

In the 1986 amendments to the Safe Drinking Water Act (SDWA), Congress directed EPA to adopt criteria under which filtration is required as a treatment technique for public water systems whose sources of supply are surface waters. In response, EPA adopted its SWTR in 1989, which, among other things, requires a specified reduction in *Giardia* and viral contamination. The SWTR sets out eleven avoidance criteria for levels of waterborne contaminants that must be met to avoid the necessity for filtration. In 1998, in response to the SDWA amendments of 1996, EPA adopted its Interim Enhanced Surface Water Treatment Rule that requires treatment for *Cryptosporidium* for water systems that employ filtration.

The requirement for filtration in the SWTR is absolute if a water system did not meet all avoidance criteria by December 30, 1991, or if a violation occurs after that date. As the Court of Appeals noted, "the upshot of this regulatory scheme is that once a public water system has been found to have violated one of the avoidance criteria, it forever remains subject to an enforcement suit requesting installation of a filtration system. This result obtains no matter how safe the system's drinking water is following the violation, and regardless of how diligent the water system is in remedying the problems that caused the avoidance-criteria in the first place." *Id.* at 40.

The filtration requirement can be enforced only by suit in federal court by EPA or by appropriate judicial enforcement sought by state agencies having primacy. The key SDWA language regarding EPA enforcement suits is, in deciding such suits, that courts "may enter . . . such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies." 42 U.S.C. § 300 g-3(b).

Massachusetts Water Resources Authority (MWRA) owns and operates the water system that provides most of the water for Boston and the surrounding area. Its sources of supply are surface waters. MWRA employs ozonation for disinfection treatment.

After adoption of the SWTR, it was determined that MWRA could not meet all the avoidance criteria. MWRA was notified by the state Department of Environmental Protection (DEP) that it would be required to install filtration by June 30, 1993. MWRA entered into an administrative consent order with DEP that deferred the filtration requirement to allow for the alternative approaches of disinfection, covered water facilities and aggressive watershed protection plans.

At first, EPA did not oppose the state consent order. In fact, the court cited a 1992 internal EPA guidance memorandum that gave state enforcement authorities discretion to postpone filtration if a system could later meet avoidance criteria through intermediate measures.

In 1998, after the state began to consider MWRA's request for a filtration waiver, EPA filed an enforcement suit in federal district court against MWRA. The lower court denied EPA's request for an injunction ordering MWRA to comply with the filtration requirement, even given that an avoidance criterion allegedly was violated in 1999. The lower court held that the SDWA did not limit courts to mechanical enforcement of EPA compliance orders and that courts have equitable discretion to withhold the filtration remedy. Accordingly, the court ordered that a trial be conducted to determine whether MWRA's alternative strategy of ozonation, chlorination and pipe replacement would better serve protection of public health than EPA's demand for filtration.

After the trial, the court held that MWRA would not be required to install filtration, finding MWRA's alternative plan to be sound when competing demands for limited resources and the potential level of risk from all potential threats to the water safety are considered. (See 97 F. Supp. 2d 155, 189.) On appeal, the U.S. Court of Appeals affirmed the trial court's decision.

EPA raised one legal argument in the Court of Appeals: whether under the SDWA courts have discretion to withhold a remedy such as filtration if it is shown that a water system has violated a requirement of the Act.

Therefore, the Court of Appeals focused on whether, in the SDWA, Congress intended to limit courts' equitable discretion to determine whether the public interest would be served by the granting of injunctive relief. It found that the SWTR itself was not controlling as the filtration requirement in it reflects EPA's policy judgment, not Congressional intent.

The Court of Appeals analyzed 42 U.S.C. § 300g-3(b), quoted above. It concluded that, since courts can issue such judgment as public health may require, they retain discretion under the SDWA to provide an equitable remedy that meets the goal.

The Court of Appeals added that, when Congress said courts *may* enter such judgment as protection of public health may require, Congress intended *may* to mean *may* in a permissive sense. Thus, it held, the SDWA preserves judicial equitable discretion and does not compel a court to issue an injunction.

The Court of Appeals rejected EPA's assertion that the court is permitting noncompliance in this case. It stated that it merely is considering the advantages and disadvantages of employing the extraordinary remedy of injunction as compared with other remedies. It found that the trial court's order was designed to assure that the SDWA's paramount objective of safe drinking water remains fulfilled in the future.

"Although the EPA is correct that filtration is an absolute requirement under the SDWA/SWTR regime for those water systems that fail to meet the avoidance criteria, the preeminence of filtration in bringing about the goal of safe drinking water is primarily a function of the Rule, not the Act. Filtration, while serving an important role in furtherance of the objective of safe water, is merely a prophylactic remedy made available to help bring about that objective." 256 F. 3d at 56.

The Court of Appeals stated that it "would do far greater violence to both the text and the purpose of the SDWA were we to strip courts of the flexibility to shape equitable decrees in appropriate situations. If Congress has left the door open to a court to exercise equitable discretion respecting enforcement of a statute such as the SDWA and the court senses that the equities of the case may favor alternative means of enacting compliance with the statute (i.e., other than the issuances of an injunction), the court does not exceed the boundaries of its authority by conducting fact-finding for the purpose of determining how best to wield its discretion in light of the priorities established in the statute. The district court did not hold a trial to revisit the underlying wisdom of the SWTR; rather, it held a trial to ascertain whether, based on both the particular facts of this case and the substantial goals of the Act, it was more appropriate to order filtration or to permit the MWRA to pursue its alternative approach to the extent that it could satisfy the Rule's avoidance criteria and ultimately provide a safe water supply." *Id.* at 57 and 58.

The Court of Appeals said that it should be a "rare case" in which a violation of regulatory standards does not result in the grant of an injunction requested by an enforcement agency. However, it said this was such a case. In declining to issue an injunction, it said the trial court properly used its equitable discretion to appropriate ends.

The Court of Appeals' reference to a rare case may be viewed as an attempt to caution that the door to judicial relief against rigid application of EPA rules may not be open very far. However, in reality, what is a rare case? If courts possess equitable discretion under the SDWA to grant or reject a request for injunctive relief, then a water system may have an opportunity to demonstrate that more cost-effective alternatives are available to protect public health. ■